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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NANCY B. BEECHER, et al.,
Petitioners,

v.

BOSTON CHAPTER, NAACP, et al.,
and
PEDRO CASTRO, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the district court impermissibly superseded a valid Massachusetts civil service seniority statute in cases dealing with hiring practices by entering remedial orders requiring that percentages of minority members of municipal police and fire departments be maintained despite significant layoffs in those departments.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioners, the Massachusetts Personnel Administrator and members of the Massachusetts Civil Service Commission, respectfully request that a writ of certiorari issue to review the judg-

Court of Appeals for the First Circuit, entered in this consolidated proceeding May 11, 1982. 1/

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 679 F.2d 965 (1st Cir. 1982) and appears in the appendix hereto. 2/ The opinion of the United States

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1/ The other parties to the consolidated appeals in the United States Court of Appeals for the First Circuit were as follows: Boston Firefighters Union, Local 718, defendant-intervenor in the District Court proceeding; and Boston Police Patrolmen's Association, Inc., defendant-intervenor in the same proceeding. The City of Boston, a defendant in that proceeding, took no appeal from the District Court decision.

2/ The appendix accompanying this petition will be designated "(A.)." The First Circuit appendices for the police and firefighter cases will be respectively designated "(1st Cir. P.A.)" and "(1st Cir. F.A.)."

District Court for the District of Massachusetts is reported at 522 F. Supp. 873 (D. Mass. 1981) and also appears in the appendix hereto. 3/

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on May 11, 1982. This petition was filed within ninety days of

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3/ Previous opinions of the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit in these cases are reported at: Castro v. Beecher, 334 F.Supp. 930 (D. Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F.Supp. 655 (D. Mass. 1973); 386 F.Supp. 1281 (D. Mass. 1975); Boston Chapter, NAACP v. Beecher, 371 F.Supp. 507 (D. Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); 423 F.Supp. 696 (D. Mass. 1976). The lower courts and the parties have referred to the cases elliptically as the "police" and "fire" cases.

that date. This Court has jurisdiction to review the judgment and opinion of the United States Court of Appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED[4/]

Constitution of the United States, Amendments X and XIV

42 U.S.C. §1983

42 U.S.C. §2000e-2(h)

Mass. Gen. Laws Ann. c. 31, §6.

Mass. Gen. Laws Ann. c. 31, §39.

Mass. St. 1980, c. 580

Mass. St. 1982, c. 190

Federal Rule of Civil Procedure 60(b)

4/ See the addendum to this petition for texts of provisions.

STATEMENT OF THE CASE

Introduction

This petition arises from an order entered by the United States District Court for the District of Massachusetts in these consolidated [5/] cases on August 7, 1981, and a judgment of the United States Court of Appeals for the First Circuit affirming that order. The District Court's order, granting plaintiffs' motion to modify prior remedial orders pursuant to Fed. R. Civ. P. 60(b), directed City of Boston and Massachusetts officials to take certain actions to maintain the percentage of black and

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5/ The police and fire cases maintained separate identities throughout their histories, see pp. 7-19, infra, until they were consolidated for purposes of hearing and decision on plaintiffs' motions to modify prior remedial orders filed April 6, 1981.

Spanish-surnamed post-probationary police and fire officers in the Boston Police and Fire Departments, despite personnel reductions in those departments. Specifically, the district court ordered that lay-offs of officers due to lack of funds not be made pursuant to a state civil service seniority statute, Mass. Gen. Laws. Ann. c. 31, §39, but rather by a procedure designed to maintain the percentages of black and Spanish-surnamed officers on the respective forces.

On May 11, 1982, the United States Court of Appeals for the First Circuit affirmed the District Court's order. A. 91. The court ruled that "[t]he district court had the equitable power to modify the consent decrees, that the Massachusetts statutory last hired, first fired seniority system is not insulated

from the court's orders, and that the orders are not unconstitutional." 679 F.2d at 978 (A. 63). The court rejected the state defendants' contentions that the district court's order impermissibly superseded a valid Massachusetts civil service seniority statute, erred by modifying its prior remedial orders in the absence of sufficient evidence of changed circumstances, and erred by modifying its prior remedial orders when none of those prior orders addressed reductions in force.

The state defendants filed the present petition for a writ of certiorari on August 9, 1981.

Prior Judicial Proceedings

The consolidated cases before the Court have extended judicial pedigrees. [6/] Plaintiffs commenced the police case in 1970 on behalf of a class of persons composed of "all black and Spanish-surnamed persons who have sought, or might have sought, or may hereafter seek employment as policemen in positions covered by Massachusetts civil service laws." Castro v. Beecher, 334 F. Supp. 930, 934 (D. Mass. 1971) (Wyzanski, J.). Their original claims, which were based on the Fourteenth Amendment, were summarized as follows:

> The claim is that among the practices by which defendants have excluded, limited, and discouraged the employment of black and Spanish-surnamed persons are (a) furnishing

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6/ The opinions of the lower courts included in the appendix to this writ set forth the course of the police and fire litigation and, accordingly, the petitioners only summarize the salient points of the cases here.

> on a discriminatory basis information about police employment opportunities, (b) establishing educational requirements not bearing upon any legitimate job qualifications, (c) requiring police applicants to submit to a written examination which has not been validated as predictive of successful job performance in the position of policeman and (d) requiring police applicants to submit to other miscellaneous job requirements, such as a height test and a swim test.

Id. After trial, the district court held that "the general intelligence type of police examinations given in 1968, 1969, and 1970 by the Civil Service Commission were not rationally or empirically significantly related to the capacity of applicants to be trained for and to perform a policeman's job." Id. at 924. 7/

7/ The district court also held, and the First Circuit affirmed, that the recruiting had been "adequately and fairly conducted, and that the educational, height, and swim test requirements all had a significant relation to a policeman's job performance." Castro v. Beecher, 459 F.2d 725, 729 (1st Cir. 1972).

An appeal followed to the First Circuit. That Court affirmed the bulk of the district court's findings, see footnote 7, but concluded that the unintentional discrimination represented by the civil service examination was racial in nature. The Court suggested that the district court's remedy was based on its "characterization of the 1968-1970 examinations as discriminating broadly against all non-mainstream whites." Castro v. Beecher, 459 F.2d 725, 736 (1st Cir. 1972). The Court stated further: "Our contrary view of the discrimination leads us to remedial measures differently affecting both those now on eligible lists and the class (of blacks and Spanish-surnamed persons) represented by plaintiffs." Id. Those remedial measures included: a "new examination," "priority pool[ing]" for class members

and "certification" by the Director of Civil Service, according to the priority pools, in response to requisitions submitted by police departments. Id. at 737; Mass. Gen. Laws Ann. c. 31, §6. 8/

On remand the district court approved and entered a consent decree, Castro v. Beecher, 365 F. Supp. 655 (1973). The consent decree in the appendix to Judge Wyzanski's 1973 opinion contained four sub-sections: "Certifications"; "Future Examinations"; "Recruitment"; and "Reporting." These subsections set forth specific obligations of the parties designed to correct violations found in

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8/ Although review of the First Circuit decision was not sought in this Court, it was subsequently characterized as "wrongly decided" in Washington v. Davis, 426 U.S. 229, 244 n.12 (1976). See pp. 39-42 infra.

previous examination and certification procedures. Id. at 661-662.

In 1975 plaintiffs brought an action pursuant to the All Writs Act, 28 U.S.C §1651, seeking injunctive relief to preserve the effect of certification and appointment procedures established by the 1973 Castro consent decree in light of certain statutory preferences contained in Massachusetts civil service law. The district court ordered the Civil Service Commission "to certify candidates on the basis of priorities established by the Consent Decree and to give effect to Massachusetts statutory preferences . . . only within each of the Groups." Castro v. Beecher, 386 F. Supp. 1281, 1285 (D. Mass. 1975) (emphasis supplied).

On July 7, 1975, the district court approved and entered a consent decree "in accordance with" its January 7, 1975, opinion and order. The consent decree (1st Cir. P.A. 112) provided for "the establishment of priority certification groups for police applicants, for an affirmative recruitment program for black and Hispanic applicants and for procedures for administration and reporting with respect to police entrance examinations." 1st Cir. P.A. 43. The decree also provided that "[a]s a city or town achieves a complement of minorities commensurate with the percentage of minorities within the community, certification shall be made according to existing Massachusetts law." 1st Cir. P.A. 122-123.

On July 13, 1976, the district court approved and entered a "Supplemental Consent Decree." 1st Cir. P.A. 124. The preface to this decree read:

> This Court having approved and entered a Consent Decree in this action on July 7, 1975, to allow a new police officer entrance examination to be given, and said examination having been given in October, 1975, the parties agree to this Supplemental Consent Decree to permit the marking of said examination and the establishment of an eligibility list for the position of police officer in the Commonwealth.

On July 1, 1979, the district court approved and entered an "Agreement As To May, 1978 Examination" signed by all parties to this action. 1st Cir. P.A. 132. The agreement provided for various administrative and procedural tasks necessary to fulfill the remedial obligations regarding examination, certification, and recruitment established by the prior decrees.

At no time during this lengthy process did the plaintiffs ever mount a challenge to the seniority provisions which underlie the current dispute. Only with their filing of a "motion to modify prior remedial orders" on April 6, 1981, some eleven years after the original complaint was filed and two years after the parties' last agreement concerning the hiring process, did the plaintiffs ask the district court to override the provisions of Mass. Gen. Laws. c. 31, §39.

The Fire Case

Unsuccessful black and hispanic applicants for appointment as City of Boston fire fighters and the Boston Chapter of the NAACP commenced the fire case in 1972. As in the police case, the plaintiffs claimed racial discrimination in violation of 42 U.S.C. §§ 1981

and 1983 in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented through appointing procedures.

In 1973 the Attorney General of the United States brought an action raising similar claims, together with Title VII claims, 42 U.S.C. § 2000e et seq., and the two actions were consolidated.

Following hearings, the district court found that blacks represented approximatley 16 percent of Boston's population, that the combined minority population was 23 percent of the total, and that blacks and hispanics represented only 0.9 percent of the fire department's sworn personnel. Boston Chapter, NAACP, Inc. v. Beecher et al., 371 F. Supp. at 514 (Freedman J.). The court found that

plaintiffs had established an unrebutted case of racial discrimination. The court found, as evidenced by the "insignificant" number of blacks and hispanics certified, that the examinations administered from 1968 through August 1971 were discriminatory. It also found that the word-of-mouth recruitment policy resulted in unintentional racial discrimination. Id. at 510, 515, 519-20.

The district court ordered a program of active recruitment of minority fire fighters, enjoined further certification based upon the results of the discriminatory examinations, ordered development of a job-related examination, and required establishment of priority certification groups for blacks and hispanic applicants. Id. at 520-23. It also ordered that the remedial measures

its decree remain in force for any city or town with a minority population greater than one per cent until the fire department of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community" at which time "certifications will be made according to existing Massachusetts law." Id. at 523.

The First Circuit affirmed, holding that plaintiffs had demonstrated that the Massachusetts civil service test had a disproportionate impact on minority hiring and that defendants had not demonstrated job relatedness. Boston Chapter, NAACP, Inc. v. Beecher et al., 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

Since the 1974 decree, the district court entered several interim consent decrees and stipulations. These subsequent orders have set procedures for administration of new examinations, establishment of eligibility lists, affirmative recruitment, and notice and reporting. As in the police case, however, plaintiffs never mounted a challenge to the statutory seniority provisions which underlie the current dispute until their "motion to modify prior remedial orders" of April 6, 1981.

Statement of Facts

The relevant facts in this most recent chapter in the police and fire cases draw their full flavor and color from the financial events occurring in the City of Boston in the spring and summer of 1981. Reference to employment

patterns in the Police and Fire Departments from 1970 to the present, however, is required to fully outline the factual basis for modification submitted by the plaintiffs and accepted by the district court.

Stipulations signed by the plaintiffs and the city defendants and submitted on July 30, 1981, and August 3, 1981, set forth these employment patterns and formed the factual basis of this case. In 1970, 2.3 percent of the 2804 sworn officers employed by the Boston Police Department were black or Hispanic. At the same time, the black and Hispanic population of the city was 16.3 percent. In 1974, prior to entry of the decree in the fire case, 0.9 percent of Boston's firefighters were black or Hispanic. At that time, those minorities comprised

approximately 23 percent of Boston's population.

Between 1974 and 1980 the percentage of minority police officers and firefighters on the Boston forces increased dramatically. During this period, the Boston Police Department hired 492 officers, of whom 213 (43 percent) were black or hispanic. As of July 6, 1981, 224 of 1,912 police officers were black or Hispanic; minority representation had risen to 11.7 percent. During the same period, 45 percent of the firefighters hired were black or Hispanic. By July 6, 1981, minority representation had increased to 14.7 percent in the fire department.

On July 7, 1981, the Boston Police and Fire Departments commenced programs of reductions in force of police officers

and fire fighters (1st Cir. P. App. 23). The departments "separated" officers from service "because of [a] lack of money." (1st Cir. P. App. 25; 27). The lay-offs were to be accomplished in compliance with the seniority provisions of Mass. Gen. Laws c. 31, §39. (1st Cir. P. App. 25; 27).

The stipulation of facts projected, and the district court found, that the July and August reductions in force contemplated by the City, if carried out according to Mass. Gen. Laws c. 31, §39, would reduce the percentage of black and Hispanic sworn personnel in the Police Department to 6.2 percent. (1st Cir. P. App. 45). The reductions proposed by the Fire Department would have dropped minority representation from 14.7 to 9.1 percent. The district court also found that the "minority population of Boston

has increased during the intervening decade to 30 percent." Id.

Against this backdrop of officer layoffs and concomitant reductions in black and Hispanic representation, the "modification" at issue was ordered.9/

REASONS FOR GRANTING THE WRIT

I. Introduction: This Petition Raises Important Questions Regarding the Relationship Between the Remedial Powers of the Federal Judiciary And the Authority of the States to Establish Seniority Systems for State and Local Government Employees.

9/ Subsequent to the modification, state legislation significantly improving Boston's financial situation was enacted, Mass. St. 1982, c. 190, enabling the city to rehire the public safety personnel it had previously been forced to terminate. Because the bill only addressed Boston's financial situation, however, and not that of the other municipalities covered by the consent decrees entered in these cases, and because the provisions of Mass. St. 1980, c. 580 ("Proposition 2 1/2"), see fn. 11, infra, may require an additional round of layoffs in many municipalities in the next fiscal year, plenary review of the First Circuit decision remains essential.

This petition presents to the Court the question whether a federal district court may supersede a valid state civil service seniority statute in order to maintain percentages of minority members in municipal police and fire departments in the face of significant layoffs in those departments. The question is significant for several reasons. First, it raises important questions regarding the relationship between the federal judiciary and seniority systems duly established by state law. The Court has previously afforded bona fide private seniority systems significant protection: it has held that a disproportionate impact on last-hired minorities does not, standing alone, invalidate facially neutral seniority systems. International

Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The recent application of this principle in American Tobacco Co. v. Patterson, ___ U.S. ___, 102 S. Ct. 1534 (1982), and Pullman Standard v. Swint, ___ U.S. ___, 102 S. Ct. 1781, 1783-84 (1982) reflects a stabilization of the standards the Court applies to bona fide seniority systems.

The extension of federal judicial power in this case to municipal layoffs, however, overriding a valid statutory seniority provision, contradicts these standards. The Court's recent decisions have upheld private seniority rights, American Tobacco, supra, and Pullman Standard, supra. This petition for the first time presents seniority issues within the framework of federal-state relations. Consequently, the question

is substantial and new to the Court.

Second, contrary to previous opinions of this Court, the district court's order bears no relation to the scope of the constitutional violations found in prior proceedings in these cases. Milliken v. Bradley, 418 U.S. 717, 744 (1974). The court abused its equitable power by ordering that minority percentages be frozen in the absence of findings that the individual minority officers afforded relief were victims of past discrimination or that the layoff of officers pursuant to the state statute would have constituted an independent violation of their rights. Pasadena v. Spangler, 427 U.S. 424, 433-437 (1976).

The question presented is also significant because the legal underpinnings of the original findings of

discrimination in the police and fire cases were explicitly discredited by this Court in Washington v. Davis, 426 U.S. 229, 244 n.12 (1976). 10/ Despite this pronouncement of disfavor, both lower court decisions under review justified the scope of the district court's order by reference to the violations found in the original suits. Their reliance on violations which rested on discredited legal grounds contravenes the principles of Washington v. Davis and thus presents a significant question for plenary review by the Court: Notwithstanding the broad scope of the remedial powers of the federal courts, can these powers be invoked to preserve affirmative action gains which were the result of an erroneous decision?

10/ See pp. 39-42, infra.

The petition also raises significant Tenth Amendment questions. Where, as here, the federal judicial power has intruded into precisely the same core function of state sovereignty -- supervision of public safety employment -- identified by the Court in National League of Cities v. Usery, 426 U.S. 833 (1976) as essential to the "independent existence" of states, the nature and scope of that intrusion warrants full review by the Court.

Finally, the question presented warrants plenary review because of its widespread importance. Recent municipal layoffs have prompted a spate of federal litigation. See, e.g., Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981); Stotts v. Memphis Fire Department, 679 F.2d 541, (6th Cir. 1982); Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982); Youngblood v.

Dalzell, 568 F.2d 506 (6th Cir. 1978). Additional litigation may be reasonably presumed in an era of decreasing municipal revenues and concomitant reductions in municipal services. 11/ This Court's decision of the question presented would define the scope of federal court authority in this novel legal context and thereby obviate the emergence of divergent trains of law from the lower courts.

11/ At the November, 1980, general election, acting under the initiative process of the Constitution of the Commonwealth of Massachusetts, the voters adopted as chapter 580 of the Acts of 1980 a tax limitation measure commonly known as Proposition 2 1/2. The principal tax limitation feature of Mass. St. 1980, c. 580, restricts most cities' or towns' total annual assessments against their real and personal property to 2 1/2% of the fair cash value of that property. See generally, Massachusetts Teachers Association v. Secretary of the Commonwealth, Mass. Adv. Sh. (1981) 1764, 424 N.E. 2d 469.

In light of the important questions raised by this petition, a writ of certiorari should issue.

II. The Lower Courts Erred By Superseding A Valid Massachusetts Statute Never Challenged In This Case.

Plaintiffs' request to modify the district court's prior orders grew out of their dissatisfaction with application of Massachusetts General Laws Ann. c. 31, §39, to the layoff of police and firemen. 12/ Under §39, if permanent employees are "separated" from their positions they are separated according to seniority. Thus the least senior employees are separated first.

12/ Section 39 is reproduced in the addendum to this petition at 2a-3a.

Section 39 has never been challenged in the long histories of the police and fire cases. Nor was it challenged in plaintiffs' "motion to modify prior remedial orders." Despite its continuing validity, however, both the district court and the court of appeals suspended its operation and ordered that percentages of minority officers be maintained despite layoffs in the respective departments. Suspension of Mass. Gen. Laws Ann. c. 31, §39, in this case represented an abuse of the district court's equitable power and an intrusion into the prerogatives of the Massachusetts Legislature. Contrary to previous opinions of this Court, the remedy imposed by the district court bore no relation to the scope of any constitutional violation found in the prior proceedings in these cases. Furthermore, the legal

basis for the original violations, viz., unintentional discrimination,[13/] was discredited by the Court in Washington v. Davis, 426 U.S. 229 (1976). The petitioners analyze each of these considerations in turn.

While the reach of federal equitable power is broad, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971), it is not plenary; there are fundamental limitations on its exercise. Hills v. Gautreaux, 425 U.S. 282, 293, (1976). A federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." Id. at 293-294, quoting Milliken v. Bradley, 418 U.S. 717, 744 (1974).

13/ See pp. 39-42, infra.

While the district court found constitutional violations in the hiring process in 1971 and 1974, and while those findings afforded a basis for its initial orders requiring new examination and certification procedures and priority pooling, the adoption of those procedures established a racially neutral system of examination and certification for public safety positions, as well as a mechanism for increasing minority representation in the respective forces. Having established those systems, the district court's order requiring that a certain percentage of minority officers be maintained, despite layoffs and despite a valid state seniority statute, exceeded the court's authority. Cf. Pasadena City Bd. of Education v. Spangler, 427 U.S. 424, 433-435 (1976) (district court

exceeded its authority by enforcing desegregation orders so as to require annual readjustment of attendance zones to insure racial balance).

The fact that the percentages of minority officers on the police and fire forces remained less than the percentage of minorities in the City of Boston does not alter this conclusion. Indeed, Pasadena v. Spangler expressly dismissed this contention:

> It may well be that petitioners have not yet totally achieved the unitary system contemplated by this quotation from Swann. . . . But that does not undercut the force of the principle underlying the quoted language from Swann. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished that objective. That being the case, the District Court was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired

> by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Id. at 436-437. Thus the Court defined the limit of federal equitable power by reference to the implementation of remedial devices, not by measuring progress toward remedial goals. Contra, Morgan v. O'Bryant, 671 F.2d 23, 26-27, 27n.5 (1st Cir. 1982)(absent "proceedings and proof showing that Boston's dual school system has been abolished," and that "desegregation remedial goals" have been "fully achieved," district court retained power to make orders premised on original constitutional violations).

14/ Where, as here, previous court orders eliminated racially discriminatory practices in the examination and certification of applicants for public safety positions, the fact that minority representation in the forces remained less than that in the city did not provide the district court with the authority to suspend a valid state statute to preserve those percentages.

The district court's order contradicts the Milliken v. Bradley formula

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14/ The Commonwealth of Massachusetts, Board of Education, recently filed a brief in opposition to the Petitions for a Writ of Certiorari in Boston Association of School Administrators and Supervisors v. Morgan, Supreme Court Docket No. 81-2124, and Local 66, Boston Teachers Union v. Boston School Committee, Supreme Court Docket No. 81-2306. These cases do not involve suspension of a valid state statute and the Commonwealth accordingly did not, and does not now contest the propriety of the lower court orders in the cases.

for another, related reason. Since the scope of a federal court's remedial orders must conform to the scope of the constitutional violation, it follows that a court may only impose burdens designed to remedy the actual effects of a prior legal violation in order to make the identified victims whole. See Fullilove v. Klutznick, 448 U.S. 448, 525 n.4 (1980)(Stewart, J., dissenting). The district court's order, however, affords relief to all minority officers, whether or not they had been wrongfully denied certification by use of the discriminatory testing device. The district court conducted no hearings to identify those scheduled for layoff who had been victimized by the past discriminatory examination and certification practices. In fact, the orders benefited primarily those not harmed by past acts of discrimination, because the relief

protected individuals most recently hired. Thus, while the opinions of the district court and the court of appeals characterize the order as a remedial measure, "it plainly operates as a quota." Fullilove v. Klutzick, 448 U.S. 448, 541 n.13 (Stevens, J., dissenting). The order was not narrowly tailored to make an identified victim whole. Id. at 525 n.4 (Stewart, J., dissenting) Rather, it swept broadly, conferring benefits indiscriminately on victims and non-victims alike.

The court of appeals placed great emphasis on the fact that "underrepresentation" of minorities still existed in the forces, and that layoffs made according to seniority would "eviscerate"[15/]

15/ Subsequent events demonstrate that the injury to those laid-off was a

(footnote continued)

relief already ordered. 679 F.2d at 974. But if these considerations alone can justify the random award of constructive seniority embodied in the district court's order, and the suspension of a valid state statute, it will serve not merely as a basis for this remedial order, but rather as a permanent source of justification for an entitlement to a certain percentage of minority officers on the City's police and fire forces. See Fullilove v. Klutznick, 448 U.S. 448, 539 (1980)(Stevens, J., dissenting).16/

(footnote continued)

temporary, economic injury. See fn. 9, supra.

16/ Ironically, the right to such an entitlement was expressly rejected by the trial judge in his opinion following remand, Castro v. Beecher, 365 F. Supp. 655, 659 (D. Mass. 1973):

(footnote continued)

Second, the district court abused its discretion by suspending operation of a valid state statute because the legal basis for the original findings of discrimination in the police case was explicitly discredited by this Court in Washington v. Davis, 426 U.S. 229 (1976). Without exception, every decision rendered in the police case has found that, to the extent discrimination occurred, that discrimination was unintentional. See, e.g., Castro v. Beecher, 334 F. Supp. 930, 934, 944, 948 (D. Mass. 1971); Castro v. Beecher, 459 F.2d 725, 727 (1st Cir. 1972).

(footnote continued)

> [The desirability of a police force drawn from all groups] does not imply that any group is entitled to a quota, nor to a fraction roughly corresponding to the fraction of the total population which belong to that group.

In Washington v. Davis, however, the Court noted that various courts of appeal had erroneously held proof of a disproportionate impact sufficient, in the context of public employment, to prove racial discrimination in violation of the Equal Protection Clause. The Court cited Castro v. Beecher as a case wrongly decided. Washington v. Davis, 426 U.S. at 244 n.12. Despite this express disapproval, the court of appeals justified the scope of the district court's order by reference to the violations found in the original suits. Boston Chapter, NAACP v. Beecher, 679 F.2d at 974. The court stated that the "independent [constitutional] violations" found in the original suits distinguished the cases from related Title VII decisional

law,[17] and characterized the "basic issue at stake" in the cases as "the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs." Id. (emphasis added). While the petitioners do not contest the fact that discrimination claims were once litigated, and that findings were entered against them, they do contest present reliance on those discredited legal conclusions to justify the "modification" of the court's previous orders. Reliance on the original erroneous conclusions to supersede yet another Massachusetts law only compounds the lower court's original mistakes. The district court's power must be circumscribed by the disfavored

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17/ See Section III, infra.

legal underpinnings of its original decisions. The lower courts' reliance on "violations" which rested on discredited legal grounds contravenes the principles of Washington v. Davis and therefore warrants plenary review by this Court.

III. The Decision of the First Circuit Contradicts Recent Decisions of This Court Upholding Bona Fide Seniority Systems.

Title VII of the Civil Rights Act establishes that:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate[.]

42 U.S.C. §2000e-2(h).

The Court examined this language in

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). There the Court held that a neutral and bona fide seniority system is not unlawful under Title VII even if it perpetuates prior discrimination. Id. at 352-355. In Teamsters, the Court faced significant minority layoffs made in compliance with seniority strictures. Id. at 349-350. The Court held that a disproportionate impact on last-hired minorities does not, standing along, invalidate a facially-neutral seniority system. Id. at 352. See also Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1188 (E.D. Pa. 1977), aff'd in part, vacated on other grounds, Croker v. Boeing Co., 662 F.2d 975 (3rd Cir. 1981) (en banc).

Two recent Supreme Court decisions have reaffirmed these precepts.

American Tobacco Co. v. Patterson, ___ U.S. ____, 102 S. Ct. 1534 (1982) (American Tobacco), and Pullman-Standard v. Swint, ___ U.S. ___, 102 S. Ct. 1781 (1982) (Pullman-Standard). Both cases addressed issues regarding the construction and application of 42 U.S.C. §2000e-2(h). More importantly, both cases underscored the protection afforded bona fide seniority systems by the statute. American Tobacco stated that the statute "exempts from Title VII the disparate impact of a bona fide seniority system even if the differential treatment is the result of pre-Act racially discriminatory employment practices." Id. at 1541. The fact that independent, discriminatory employment practices are "perpetuated" by application of a bona fide seniority system does not form a

sufficient predicate for invalidation of the system. American Tobacco, 102 S. Ct. at 1541. Absent a discriminatory purpose in application or operation of the system, the system itself is not an unlawful employment practice even if the system has some discriminatory consequences. Pullman-Standard, 102 S. Ct. at 1784, citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977).

Application of Mass. G.L. c. 31, §39 should be evaluated in accordance with these tenets. Since §39 sets forth precisely the type of seniority-based layoff system envisioned by Title VII and approved by the Supreme Court, it should control the layoffs in this case. Such a result accords with the congressional judgment that:

> . . . Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

Teamsters, 431 at 352-353.

Here, however, the court of appeals found sufficient justification to override seniority rights. The court stated:

> We find nothing in this trilogy that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system. . . . None of the Supreme Court cases apply to the basic issue at stake here; the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs. To hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted.

Boston Chapter, NAACP v. Beecher, 679 F.2d at 974. See also Stotts v. Memphis Fire Department, 679 F.2d 541 (6th Cir.

1982) (advancing several theories to permit consent decree to alter collective bargaining agreement seniority provisions). The court of appeals thus distinguished the cases before it from the Title VII precedents on the basis of: (1) the "independent," litigated findings of discrimination; and (2) the Court's power to preserve relief achieved pursuant to previous orders.

These considerations did not justify the relief ordered. The petitioners recognize that independent, litigated findings of discrimination in employment practices may entitle persons affected by those practices to full relief, including their rightful place in the seniority system, see Franks v. Bowman Transportation Co., 424 U.S. 747 (1975); that such relief may insulate those

persons from the effects of a "last-hired, first-fired" layoff system; and that a court may act to insure that result. Only those affected by the discriminatory practices, however, may invoke such protection. For example, individuals who fail to timely challenge discrimination cannot later complain of a "continuing violation" embodied in the seniority system. Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. at 1187. Similarly, those persons not victimized by past acts of discrimination should not be afforded relief that suspends valid statutory seniority provisions, because no factual predicate exists for such relief.

Notwithstanding these limitations on plenary relief, the district court's orders benefited primarily persons who neither challenged nor were harmed by

past acts of discrimination. See Boston Chapter, NAACP v. Beecher, 679 F.2d at 976 and 976 n.14. The district court conducted no hearings to identify which of the police and firemen scheduled for layoff had been victimized by the past discriminatory examination and certification practices. Indeed the fact that the relief protects individuals most recently hired ensures that few, if any, members of the original class will benefit from the remedial orders. See id. at 976.

Thus, the distinction drawn by the court of appeals between this case and the Title VII decisional law upholding seniority rights -- "the litigated findings of discrimination" -- is unsupported by the factual record. In the absence of proof of discrimination as to each individual minority officer, class-wide

relief is improper. Under the circumstances, the lower courts lacked the authority to insulate persons not victimized by discrimination from the effects of the seniority system. The court's power to "preserve relief" was properly limited to insuring that the victims of discrimination retained their rightful place in the seniority system, protected from discharge under the "last-hired, first-fired" layoff system. See Franks v. Bowman, 424 U.S. 747, 762-770 (1975). The court's foray beyond that well-defined limit contravened relevant precedents of this Court and, accordingly, warrants plenary review.

IV. The Lower Court Decisions Contradict Principles Of Federalism Embodied In The Tenth Amendment And Applied By This Court In National League Of Cities v. Usery.

The Tenth Amendment to the United States Constitution states, in relevant part:

> [T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to its people.

United States Constitution, Amendment X. Thus, powers not delegated to the Federal Government either expressly or as incidental or implied powers are reserved to the states. Penn Dairies v. Milk Control Commission, 318 U.S. 261 (1943); United States v. Hubbard, 474 F. Supp. 64 (D.D.C. 1979). The Court in National League of Cities v. Usery, 426 U.S. 833 (1976), applied the Tenth Amendment as an affirmative limitation upon federal authority to enact legislation which directly impairs state autonomy in areas of government traditionally reserved to

the states. The Usery Court declared that by imposing wage and hour regulations upon states as employers, Congress had interfered with the ability of the states to make decisions affecting essential state functions. Id. at 851-52. The Court stated that authority "to structure employer - employee relationships in such areas as fire prevention, police protection . . . " was essential to the "independent existence" of states and thus was an integral element of state sovereignty. Id. Accord, Federal Energy Regulatory Commission v. Mississippi, ___ U.S. ___, 102 S. Ct. 2126, 2143 n.32 (1982); see id. at 2147-2157 (O'Connor, J., dissenting in part).

The seniority principle contained in Mass. Gen. Laws c. 31, §39, represents a

legislative exercise of traditional state authority. Moreover, in the context of this case, application of §39 represents the identical function -- regulation of employment in public safety positions -- found by the Usery court to be essential to a state's "independent existence." 18/ Under these circumstances, Usery counsels that a federal court should not

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18/ The First Circuit in State of New Hampshire v. Marshall, 616 F.2d 240, 248-49 (1st Cir. 1980), distinguished Usery in its review of application of the 1976 amendments to the Federal Unemployment Tax Act to New Hampshire's Unemployment Compensation Law. In its discussion of "impairment of state sovereignty," id. at 248, the Court concluded that the extension of unemployment benefits to certain employees of New Hampshire would not alter the ability of the state to "structure" its "employer-employee relationships" in, inter alia, public safety positions. In the present case, however, abrogation of §39 represents a significant alteration of that ability.

interfere, by "modification" of prior orders, with an essential state function absent a finding that the applicable state law is unconstitutional. The lower court decisions in this case, superseding a valid state statute, contravene rights reserved to the Commonwealth of Massachusetts by the Tenth Amendment. Here the provisions of a presumptively valid state statute have been set aside notwithstanding the fact that no direct challenge to the statute was ever mounted. The justification for past action is the remedial authority of the court, i.e., its ability to implement an eleven year old decision which this Court has already described as erroneous. Such action necessarily enervates the Tenth Amendment and its underlying doctrines.

Plenary review by the Court is therefore warranted.

Conclusion

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

FRANCIS X. BELLOTTI
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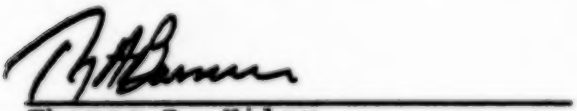

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Constitution of the United States

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

42 U.S.C. §2000e-2(h)

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earn-

ings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Massachusetts General Laws Ann.

ch. 31, §39

If permanent employees in positions having the same title in the departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in

accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to this being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower titles or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.

Federal Rules of Civil Procedure

Rule 60(b)

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a

judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.